

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2007-205-E - ORDER NO. 2008-483
JULY 3, 2008

IN RE: Mack A. Smith,)	ORDER DISMISSING
)	COMPLAINT
Complainant/Petitioner)	
)	
v.)	
)	
Progress Energy Carolinas, Inc.,)	
)	
Defendant/Respondent)	

This case was filed on or about May 18, 2007, by the Complainant Mack Smith against Progress Energy Carolinas, Inc. (“Progress Energy”). After a June 13, 2007, hearing on the complaint, it appeared that an agreement had been reached between Progress Energy and Mr. Smith; however, such an agreement did not materialize. The Commission then by directive dated June 18, 2007, ordered interim relief, and the case proceeded as set forth below.

The Complainant was directed by the Commission to prefile testimony on or before August 16, 2007. On August 1, 2007, Mr. Smith moved to waive the requirement that he be required to prefile testimony. The Respondent, Progress Energy, objected to this request. On August 15, 2007, the Commission’s hearing officer, Charles Terreni, denied the motion to waive the prefiled testimony requirement.

On August 23rd, Mr. Smith filed four exhibits, which he identified as “Itron data meter and calculation sheets” and stated that “the [Itron Corporation’s] Chief Engineer or

Plant Manager will testify as to all evidence herein”. Progress moved to dismiss the complaint for failure to comply with the prefiled testimony requirement by way of a letter dated August 27, 2007. On September 12, 2007, the Commission denied Progress’s motion to dismiss, and directed the docketing staff to issue new dates for prefiled testimony. Directive, September 12, 2007. The docketing department set a new deadline for prefiled testimony of October 31, 2007. In its directive of September 12, 2007, the Commission made its expectations clear:

... [In] providing this second opportunity to Mr. Smith, we state clearly our expectation and requirement that if he has any witnesses that he intends to call at the hearing, other than hostile witnesses appearing pursuant to subpoena, he must pre-file their testimony within the new deadlines that will be set in the case. We further note that our pre-filing requirement applies to any testimony that Mr. Smith himself would intend to give in this matter.
Id.

On October 31st, 2007, Mr. Smith prefiled forty pages of exhibits, with the accompanying sentence: “Complainant will testify to all the information in his pre-filed exhibits”. On November 6, 2007, Progress Energy again moved to dismiss Mr. Smith’s complaint for failure to comply with the Commission’s rules requiring prefiled testimony. The Commission held a hearing On December 12, 2007, to hear from the parties as to whether Mr. Smith’s complaint should be dismissed.

The Commission’s Regulation 103-845 requires any party “to file copies of testimony and exhibitswithin a specified time in advance of the hearing.” At the hearing, Mr. Smith argued that he had complied with the prefiled testimony requirement because he intended to offer testimony regarding his prefiled exhibits. Mr. Smith may

have filed exhibits as required by the Commission's regulation, but he has not prefiled his testimony regarding the exhibits. Nor can Mr. Smith transform his prefiled exhibits into testimony by incorporating them into his testimony "by reference", as he argued at the hearing, because his filing fails to give the exhibits the necessary context or explanation. Mr. Smith's filing fails to give any reasonable indication of what he might say about the exhibits or his case.

Because the Commission's prefiled testimony requirement does not apply to hostile witnesses, Mr. Smith argued that he was not required to submit any testimony. Mr. Smith stated that he intended to subpoena "hostile" witnesses, the plant manager, and the chief engineer of the Itron corporation, a manufacturer of electric meters, to testify about exhibits pertaining to the operation of electric meters, and that he would present his case through these individuals. He also stated that he would elicit testimony from employees of Progress Energy at the final hearing. We do not see how Mr. Smith could present his case solely through the testimony of these individuals. Indeed, Mr. Smith's filing of October 31st indicates that he intended to offer his own testimony in the matter. Mr. Smith submitted several charts, apparently prepared by him, entitled: "List showing Constant Charges from 1987"; "List showing Comparison between Sentinel and Polyphase Meters"; "Khw (sic) used since 1987"; and "List showing Damages" (including various items with dollar amounts left blank). However, Mr. Smith did not submit testimony explaining these charts and what he intended to show with them.

Mr. Smith also argued for the first time at the hearing that he has complied with the prefiled testimony requirement by submitting a verified complaint at the outset of this

matter. Mr. Smith's complaint is not the equivalent of prefiled testimony. Mr. Smith's complaint makes several allegations, some apparently based on his own knowledge; however, many are made "on information and belief". Mr. Smith's complaint is not the equivalent of prefiled testimony and does not give either the parties or the Commission any reasonable expectation of what Mr. Smith may testify to as his own witness in a hearing.

In the alternative, Mr. Smith argues that the Commission should waive the prefiled testimony rule in the interest of justice and judicial economy. We decline to do so. The Commission and the parties simply have not been given adequate notice of the substance of Mr. Smith's testimony, which is the reason for requiring prefiled testimony in proceedings before the Commission. Nor would it be reasonable to waive the prefiling requirement as Mr. Smith requested. We have heard complicated presentations in other cases in which lay witnesses and *pro se* litigants worked hard to learn the Commission's prefiled testimony rules and complied with them. In contrast, Mr. Smith reminded us on several occasions of his experience as a practicing attorney, but failed to pre-file his testimony in accordance with the rules.

Mr. Smith also argued that the Commission has failed to rule on a motion to allow four of his prefiled exhibits admitted as a business record. Since Mr. Smith has failed to comply with the prefiling requirement, the Commission does not need to rule on this motion.

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In sum, Mr. Smith was given three opportunities to pre-file testimony in compliance with this Commission's requirements, but he has failed to do so. Accordingly, Mr. Smith's complaint is dismissed with prejudice.

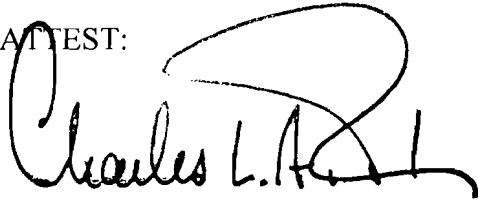
This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



G. O'Neal Hamilton, Chairman

ATTEST:



Charles L. A. Terreni, Chief Clerk/Administrator

(SEAL)